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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HAROLD L. COHEN

Appeal 2007-4368
Application 10/620,207
Technology Center 3600

Decided: December 31, 2007

Before BRADLEY R. GARRIS, CHARLES F. WARREN, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

1 Appellant appeals under 35 U.S.C. § 134 the final rejection of claims 1-10, 24-26, and 31-35. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM-IN-PART and REMAND.

INTRODUCTION

Appellant discloses an insect control product that includes an insert and a box or housing for holding the insert (Specification 2:22-23). The insert is coated on both sides such that a first portion and a third portion are

left uncoated for attachment to the housing (Fig. 2, ref. no. 23, 28; Fig. 3, ref. no. 26, 27; Specification 11: 17-30). The insert is folded along fold lines into a Z-shape, which permits the box or housing containing the insert to be compressed for packaging and easily opened for use (Specification 10: 2-23; 12: 1-12).

Claims 1, 4, 9, 24, and 32 are illustrative:

1. An insert for an insect control product comprising:
 - a) a first side and an oppositely facing second side;
 - b) a first portion;
 - c) a middle portion; and
 - d) a third portion, the middle portion connected to the first portion along a fold line and the third portion connected to the middle portion along a fold line.
4. The insert for an insect control product according to claim 2 wherein the coated region of the first side covers the middle portion to form a coated middle portion and covers a coated part of the third portion and wherein the first portion of the first side is noncoated.
9. The insert for an insect control product according to claim 2 wherein the coated region of the first side covers the middle portion and a coated part of the third portion leaving a non-coated first portion, and wherein the coated region on the second side covers the middle portion and coated part of the first portion leaving a non-coated third portion, and wherein the non-coated portion of the first side and the non-coated portion of the second side each abuts and extends along an interior surface of a box having opposed first and third panels into which the insert is placed such that the insert is capable of being compressed along with the box when a load is applied to the first and third panels and the insert is capable of returning the box to its pre-compressed condition when the load is removed by forcing on the first panel and the third panel.
24. An insect control product comprising:

- a) an insert comprising: a first side and an oppositely facing second side, a first portion, a middle portion, a third portion, the middle portion connected to the first portion and the third portion along fold lines;
- b) a formula, the formula applied on a coated region of the first side leaving the third [*sic* first] portion of the first side noncoated, and the formula applied on a coated region on the second side leaving the third portion of the second side noncoated;
- c) a box comprising an interior surface and an exterior surface, the box defining a plurality of holes for insects to enter the box; and
- d) the insert folded to comprise a Z-shaped cross section, and the insert positioned in the box such that only the noncoated portion of the first side and the noncoated portion of the second side contact the interior surface of the box.

32. An insect control product comprising:

an insert comprising a first side and an oppositely facing second side and having a first portion, a middle portion and a second portion wherein the first portion is joined to the middle portion along a fold line and the second portion is joined to the middle portion along a fold line such that the middle portion is positioned between the first and second portions;

a formula applied on a coated region of the first side leaving the first portion of the first side noncoated and the formula applied on the second side leaving the third portion of the second side noncoated;

a housing comprising opposed panels and an interior surface and an exterior surface and defining an interior that is empty;

the insert folded along the fold lines so that it has a Z-shaped cross section and the insert is introduced into empty interior of the housing such that the entire area of the noncoated portion of the first side abuts one of the panels and the entire area of the noncoated portion of the second side abuts the other panel; and

the insert has a natural spring constant such that after the housing is compressed the noncoated portions of the first and second sides are capable

of forcing on the opposed panels to move the housing back to its pre-compressed shape.

The Examiner relies on the following prior art references as evidence of unpatentability:

Cohen	US 5,042,194	Aug. 27, 1991
Monett	US 5,438,792	Aug. 8, 1995

The rejections as presented by the Examiner are as follows:

1. Claims 1-3, and 6-8 are rejected under 35 U.S.C. § 102(b) as being unpatentable over Cohen.
2. Claims 1, 24, and 31 are rejected under 35 U.S.C. § 102(b) as being unpatentable over Monett.
3. Claims 4, 5, 9, and 10 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Cohen.
4. Claims 25, 26, and 32-35 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Monett.

Appellant separately argues all of the claims on appeal.

OPINION

35 U.S.C. § 102(b) REJECTION OVER COHEN

CLAIMS 1 AND 6

Appellant argues that the structure recited in Cohen is significantly different than that recited in claim 1 (Br. 16). Specifically, Appellant contends that the Examiner eliminated Cohen's first outer wall panel 16, fold line 13, third outer wall panel 20, and fold line 19 in his finding that

Cohen anticipates Appellant's claim 1 (Br. 16). Regarding claims 1 and 6, Appellant additionally argues that Cohen cannot reasonably be found to disclose an "insert" because nothing in Cohen is inserted into another structure (Br. 17 and 18). Regarding claim 6, Appellant further argues that there is no structure in Cohen's insect trap having a Z-shaped configuration (Br. 18).

We have considered all of Appellant's arguments and are unpersuaded for the reasons below.

Appellant argues that Cohen has additional panels (i.e., the first out wall panel 16 and third outer wall panel 20) and fold lines such that the structure of Cohen's insect trap is "significantly different" than that recited in claim 1 (Br. 16). However, Appellant uses the open-ended claim language "comprising" in claim 1. The open-ended claim language "comprising" means that the recited claim features are essential, but other features may be added and still form a construct within the scope of the claims. *In re Crish*, 393 F.3d 1253, 1257 (Fed. Cir. 2004).

Accordingly, Appellant's use of the transitional claim term "comprising" in the claim does not exclude Cohen's additional panels and fold lines. Stated differently, the Examiner has not eliminated structure from Cohen as argued by Appellant; rather, the Examiner has established that Cohen discloses the recited structural claim features and additional structure that is not excluded by claim 1.

Furthermore, regarding the Z-shaped configuration of claim 6, the Examiner properly determined that Cohen discloses in Figure 3 such a configuration "by following the top panel from the top left to the divider

panel at the top right diagonally downwardly to the bottom left and straight across the bottom panel” (Ans. 4).

Regarding Appellant’s “insert” argument, claims 1 and 6 are product claims that recite that the product is intended to be used as an “insert” (Claim 1). It is well settled that the recitation of a new intended use of an old product does not make a claim to that old product patentable. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). Accordingly, Appellant’s argument regarding whether Cohen discloses an “insert” as claimed is unpersuasive because such is merely a statement of intended use for the product. As noted above, Cohen’s disclosed insect trap structurally satisfies the features of claims 1 and 6. Therefore, we affirm the Examiner’s § 102(b) rejection of claims 1 and 6.

CLAIMS 2 AND 3

With regard to claims 2 and 3, Appellant argues that Cohen does not disclose applying a formula (i.e., insecticide) to a first and second side of the insert (Br. 17).

We have considered Appellant’s argument and are unpersuaded for the reasons below.

The Examiner finds that the “coated region” recited in claim 2 can be interpreted as the area that the coating will cover (i.e., a coated region of the first divider panel 12 being the first side and a coated region of the second divider panel 14 being the second side as shown in Figures 1 and 3) (Final Office Action 2). We agree.

As clearly shown in Figure 1 of Cohen, the divider panels 12 and 14 (i.e., first and second sides, respectively) are coated with insecticide 70 and

are oppositely facing (i.e., as shown in Figure 1 the first side panel 12 folds to face right and the second side panel 14 folds to face left). Moreover, as shown in Figure 3, when assembled, the first side panel 12 (i.e., the first side) faces upwardly, and the second side panel 14 (i.e., the second side) faces downwardly.

Accordingly, the features of claims 2 and 3 are satisfied by Cohen. We affirm the Examiner's § 102(b) rejection of claims 2 and 3.

CLAIMS 7 AND 8

Claims 7 and 8 depend from claims 4 and 5, respectively. Claims 4 and 5 were not rejected under § 102(b) over Cohen. Accordingly, we procedurally reverse the § 102(b) rejection of claims 7 and 8 over Cohen because claims 4 and 5 from which claims 7 and 8 respectively depend are not part of the § 102 rejection.

Therefore, we procedurally reverse the § 102(b) rejection of claims 7 and 8 over Cohen.

35 U.S.C. § 103 REJECTION OVER COHEN

CLAIMS 4, 5, AND 9

Appellant argues that Cohen does not teach or suggest a first portion of the first side being non-coated (claims 4 and 9), or a third portion of the second side being non-coated (claims 5 and 9) (Br. 22-24). Appellant argues that there is no motivation to modify Cohen such that the first portion of the first side is non-coated and the third portion of the second side is non-coated (Br. 22-24). We agree with Appellant's arguments.

With regard to claims 4, 5, and 9, the Examiner finds that Cohen discloses “the coated region covering part of the middle portion and a coated part of the first portion and third portion” (Final Office Action 3). Based on this finding the Examiner concludes that it would have been obvious to cover the entire middle portion to increase the chances of an insect coming into contact with the insecticide coating (Final Office Action 4) and to change the location of the coating in the trap to suit trapping and destroying different insects which have different sizes and different habits (Ans. 4).

The Examiner’s rationale for modifying Cohen does not indicate how the argued features of claims 4, 5, and 9 would be satisfied by Cohen. Cohen does not teach or suggest leaving the first portion of the first side uncoated (claim 4 and 9) or the third portion of the second side uncoated (claim 5 and 9). Rather, Cohen discloses that the “entire surface” can be coated with the insecticide 70 (Cohen col. 3, ll. 66-68; col. 4, ll. 1-5; Figure 1).

Furthermore, Cohen’s disclosure to coat the entire surface indicates that the Examiner’s rationale is based upon impermissible hindsight and undermines the Examiner’s conclusion that it would have been obvious to change the location of the insecticide coating in the trap to suit trapping and destroying different insects. Specifically, if, as disclosed by Cohen, the entire surface is coated with insecticide then the likelihood of killing an insect is maximized already such that the Examiner’s rationale for modifying Cohen by changing the insecticide locations to tailor the trap to specific insects would be unnecessary (i.e., no modification would be necessary since the trap would already be suited to kill any insect capable of entering the trap due to the entire surface of the trap being coated).

Therefore, absent impermissible hindsight, there would be no reason for one skilled in the art to remove the insecticide coating from a first portion of the first side and a third portion of the second side. Removing the insecticide coating from the first portion and third portion would decrease the insecticide coverage thereby undesirably decreasing the chances of killing an insect.

For that above reasons, we reverse the Examiner's § 103 rejection of claims 4, 5, and 9 over Cohen.

CLAIM 10

The Examiner indicates that first side panel 12 (i.e., first portion) has a tab 42 and outer wall panel 22 (i.e., third portion) has end closures 36, 38 (i.e., tabs) such that, in view of the decision in *In re Harza*, 274 F.2d 669 (Fed. Cir. 1960), it would have been obvious “to provide the first portion [i.e., first divider panel] with more than one tab for multiplied effect” (Final Office Action 4).

The Appellant argues that Cohen nowhere suggests the claimed opposed tabs (Br. 24).

We cannot sustain the Examiner's § 103 of claim 10 over Cohen.

The Examiner's rationale for increasing the number of tabs on first divider panel 12 (i.e., first portion) is based on impermissible hindsight. Cohen provides no suggestion to add additional tabs to the first portion or third portion of the insect trap. Rather, the tab 42 fits into slit 44 to aid in assembling the insect trap and the end closures 36, 38 and 24, 26 close the sides of the insect trap, such that additional tabs on the first or third portion

would not be necessary or desired (i.e., there are already a sufficient number of tabs to close the trap).

For the above reasons, we reverse the Examiner's § 103 rejection of claim 10 over Cohen.

35 U.S.C. § 102(b) REJECTION OVER MONETT CLAIMS 1 AND 31

Appellant argues that Monett discloses an entirely different structure than that recited in claims 1 and 31. Specifically, Appellants argues that Monett does not disclose that the upper sheet 12 is, by itself, an insert, but rather that the composite upper sheet 12, lower sheet 12' and adhesive sheet 20 comprise the folded composite sheet 30 (i.e., insert), which is different than Appellant's claimed insert (Br. 19-20, 21).

We have considered Appellant's arguments and are unpersuaded for the reasons below.

Appellant's arguments appear to be that claims 1 and 31 require that the insert be a made of a single layer, rather than a composite. However, Appellant uses open-ended claim language "comprising" in claims 1 and 31. The open-ended claim language "comprising" means that the named claim features are essential, but other features may be added and still form a construct within the scope of the claims. *Crish*, 393 F.3d at 1257.

Accordingly, claims 1 and 31 are not limited to a single layer construction as implied by Appellant's arguments. Rather, the additional structure of Monett's insert (i.e., adhesive sheet 20 and upper and lower sheets 12 and 12') is not excluded by Appellant's use of the open-ended claim term "comprising."

Therefore, we affirm the Examiner's § 102(b) rejection of claims 1 and 31 over Monett.

CLAIM 24

As an initial matter, Step (b) of claim 24 recites that “the formula applied on a coated region of the first side leaving the third portion of first side uncoated” (Claim 24). Appellant indicates that the claim should actually read “the formula on a coated region of the first side leaving a *first* portion of the first side noncoated” (emphasis added) (Br. 21). Appellant's Specification supports the position that the phrase “leaving a third portion of the first side noncoated” is clearly incorrect (Specification 7:24-25; 9:5-7). Accordingly, for the purposes of this appeal, we interpret Step (b) of claim 24 as reading “a formula, the formula applied on a coated region of the first side leaving the first portion of the first side noncoated, and the formula applied on a coated region on the second side leaving the third portion of the second side noncoated.”¹

Appellant argues that Monett discloses a film to which “adhesive is applied,” not the claimed formula applied to coated regions of the first or second sides (Br. 20). Appellant contends that Monett's adhesive is not the same as the claimed formula applied on coated regions of the first and second sides of the insert (Br. 20). Appellant further contends that Monett discloses a V-shaped, not the claimed Z-shaped cross-section for the insert (Br. 20).

¹ This claim informality should be corrected in any further prosecution of this application.

We have considered all of Appellant's arguments and are unpersuaded for the reasons below.

Appellant's argument is that the adhesive is not the same as the claimed "formula" (Br. 20). However, claim 24 does not recite a specific composition for the claimed "formula." During examination, claim terms are given their broadest reasonable interpretation consistent with the Specification. *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). However, features in the Specification must not be read into claims. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

Accordingly, because claim 24 does not recite what is included in the term "formula," the broadest reasonable interpretation of "formula" would include any compound (e.g., adhesives). Though Appellant's Specification indicates that the formula "comprises an insecticide" (Specification 7:12), we decline to read such a limitation into the claims. *Zletz*, 893 F.2d at 321.

We also note that while Monett disclose that it is preferable that the adhesive not contain an insecticide (Monett, col. 5, ll. 65-66), such disclosure is merely a preference. Instead, Monett's disclosure indicates that the adhesive may contain insecticides, albeit a non-preferred embodiment, which further supports a determination that Monett's adhesive is a "formula" as claimed by Appellant. All of the disclosures in a reference must be evaluated for what they fairly teach one of ordinary skill in the art. *In re Boe*, 355 F.2d 961, 965 (CCPA 1966).

Regarding the Z-shaped cross-section, we note that Monett discloses such a claim feature. Specifically, as shown in Monett's Figures 4A and 5, the coated regions of the insert are located in apertures 14 with upper sheet 12 and lower sheet 12' on either side of the sheet. The sheet is folded to

form a series of Z-shaped cross-sections. For example, a Z-shaped cross-section may be traced by starting with the non-coated portion of upper sheet 12 that touches the top 52 of the box (Figure 1 and the far left of Figure 5), following the dashed lines of the insert to where lower sheet 12' contacts the bottom of the box 60 (Figure 1 and Figure 5), further following the dashed line to where the upper sheet 12 of the insert contacts the top 52 of the box and finally following the dashed line of the insert to where the lower sheet 12' contacts the bottom 60.

Because Appellant's argued claim features are taught by Monett, we affirm the Examiner's § 102 rejection of claim 24 over Monett.

35 U.S.C. § 103 REJECTION OVER MONETT CLAIMS 25 AND 26

Regarding claim 25, Appellant argues that Monett does not teach that it can be modified such that both sides of the middle portion are coated (Br. 25). Appellant contends that the Examiner's proposed modification of Monett by increasing the coated area of the middle portion would not work because making the entire middle coated would cause the entire structure to collapse on itself as there would be no structure to support the adhesive sheet (Br. 25).

Regarding claim 26, Appellant argues that Monett does not suggest using the claimed insecticide (Br. 26). Appellant argues that Monett uses adhesive such that the insect is trapped in the adhesive and dies within the box, not outside the box as claimed (Br. 26-27).

We have considered all of Appellant's arguments and are unpersuaded for the reasons below.

Regarding claim 25, Appellant does not dispute that Monett discloses that the first portion of the first side and the third portion of the second side are coated. Rather, Appellant only argues that Monett does not suggest that the middle portion of both sides of the insert may be coated (Br. 25).

Monett discloses that the middle portion of the composite sheet (i.e., section 15 between score lines A-A' and B-B' in Figure 2) is coated with adhesive (Figure 2, ref. no. 14 and Figures 3 and 4A, ref. no. 12, 12' and 20). As clearly shown in Monett's Figure 4A, the adhesive is exposed on both sides of the composite sheet insert 30 (Monett, Figure 4A, ref. no. 14, 20, 12 and 12'). Moreover, Monett discloses that each of the apertures 14 have adhesive sheet 20 (i.e., coating) extending through them such that the first portion of the second side (i.e., section 15 preceding score line A-A') and the third portion of the first side (i.e., section 15 between score lines B-B' and C-C') are coated. Accordingly, Monett discloses the argued claim feature that the middle portion of both sides be coated.

Regarding Appellant's argument that the Examiner's modification of Monett would not work (i.e., no reasonable expectation of success), we note that claim 25 does not require that the entire middle section of the first and second sides be coated. Rather, all that claim 25 requires is that the middle portion and the first portion of the first side be coated and the middle portion and third portion of the second side being coated.

As noted above, Monett discloses the argued claim feature; the middle portion of the first and second sides are coated (Monett, Figure 4A, ref. no. 14, 20, 12 and 12'). Monett further discloses that the composite sheet 30 is made by adhering the upper and lower sheets 12 and 12' together using the adhesive 20 (Monett, col. 5, ll. 38-52). Accordingly, one of ordinary skill

would have reasonably expected that apertures 14 of the middle portion may be successfully enlarged to expose more adhesive to catch more insects while the upper and lower sheets (12 and 12') are adhered together via adhesive sheet 20 to maintain the insert's structural integrity.

Furthermore, we agree with the Examiner that increasing the size of the coated middle portion would increase the chance of catching insects (Final Office Action 4) such that it would have been obvious to increase the size of the apertures in the middle portion of the insert.

If Appellant's argument is suggesting that one of ordinary skill would have enlarged the aperture 14 to such a size that there would be no part of upper or lower sheets 12 or 12' left for adhesive 20 to adhere to such that the composite sheet 30 would collapse on itself, a person of ordinary skill is a person of ordinary creativity not an automaton. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007). Accordingly, one of ordinary skill would not have enlarged the apertures 14 to such an extent that the composite sheet 30 would collapse on itself and the device would cease to function.

Regarding claim 26, Monett discloses that it is preferable that no insecticide be used with the adhesive (Monett, col. 5, ll. 65-66). However, Monett's disclosure is merely a preference, not a requirement. All of the disclosures in a reference must be evaluated for what they fairly teach one of ordinary skill in the art. *In re Boe*, 355 F.2d 961, 965 (CCPA 1966). Accordingly, Monett's disclosure is reasonably interpreted as indicating that insecticide may be used with the adhesive, albeit a non-preferred embodiment.

Moreover, we agree with the Examiner that adding an insecticide with Monett's adhesive would have been obvious in order to kill more insects (Final Office Action 4).

Appellant's claim 26 recitation regarding how the insecticide functions by killing the insect that contacts the insecticide outside of the box is merely a desired result. In other words, where the insect dies does not affect the structure of the product. Since Monett discloses the structural features of claim 26, whether the insect contacts the insecticide and remains in the box or leaves the box to die, the product claim 26 is still satisfied by Monett. Accordingly, if an insect contacts the insecticide in Monett's trap, is unable to free itself from the adhesive, and the insect dies in the box, Monett would still satisfy product claim 26.

For the above reasons, we affirm the Examiner's § 103 rejection of claims 25 and 26 over Monett.

CLAIMS 32-35

Appellant argues that claim 32 requires, and Monett does not suggest, a Z-shaped cross-section wherein "the entire noncoated portion of the first side abuts against one of the panels, and the entire noncoated portion of the second side abuts the other panel" (Br. 27). Appellant argues regarding claim 35 that Monett does not disclose an insert folded into a Z-shaped configuration that forces against opposed panels of the box, such that only noncoated portions of the first and second sides of the insert extend along and force against opposed panels as required by claim 35 (Br. 29). We agree with Appellant's arguments.

The Examiner has not shown where the argued features of independent claims 32 and 35 are taught or suggested by Monett. The most the Examiner states regarding claim 32 is as follows: “it would have been obvious to assemble the insert and the housing in the manner recited since the end result trap is the same and no showing of unexpected results was made” (Final Office Action 4).

We note that Monett’s configuration is not the same as Appellant’s recited in claims 32 and 35 because the insert does not have a Z-shaped cross section introduced into the housing such that “the entire area of the noncoated portion of the first side abuts one of the panels and the entire area of the noncoated portion of the second side abuts the other panel” (claim 32) or the insert folded into a Z-shaped cross-section and moved into a box such that “the entire noncoated portion of the first side extends along and forces against the first panel [of the box] and the entire noncoated portion of the second side extends along and forces against the third panel [of the box]” (claim 35).

The Examiner has not satisfied his initial burden of establishing a prima facie case that claims 32-35 are unpatentable under § 103 over Monett. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

Therefore, we reverse the Examiner’s § 103 rejection of claims 32-35 over Monett.

REMAND

We remand the application to the Examiner to determine whether dependent claim 10 should be rejected under 35 U.S.C. § 102 over Cohen

(US 5,042,194). Claim 10 depends on claim 1. As noted above, we sustained the Examiner's finding that claim 1 is anticipated by Cohen.

Regarding claim 10, the outer wall panel 16, which may be considered part of the first divider panel (i.e., first portion), has two opposed tabs 28 and 32 (Cohen, Figure 1, ref. no. 16, 28, 32; col. 18-20; 57-60). Additionally, the outer wall panel 20, which may be considered part of the outer wall panel 22 (i.e., third portion), has two opposed tabs 30 and 34 (Cohen, Figure 1, ref. no. 20, 22, 30, and 34; col. 20-25; 57-60). Accordingly, it appears that Cohen discloses the structural features of claim 10.

Regarding the claim recitation, "wherein the first and second tables for being received in a conveyor," such appears to be merely an intended use. The recitation of a new intended use of an old product does not make a claim to that old product patentable. *Schreiber*, 128 F.3d at 1477.

Therefore, in response to this remand, the Examiner must determine, and make of record this determination, whether claim 10 should be rejected under § 102 over Cohen.

DECISION

We AFFIRM the Examiner's § 102(b) rejection of claims 1-3 and 6 over Cohen.

We PROCEDURALLY REVERSE the Examiner's § 102(b) rejection of claims 7 and 8 over Cohen.

We REVERSE the Examiner's § 103(a) rejection of claims 4, 5, 9, and 10 over Cohen.

We AFFIRM the Examiner's § 102(b) rejection of claims 1, 24, and 31 over Monett.

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We AFFIRM the Examiner's § 103(a) rejection of claims 25 and 26 over Monett.

We REVERSE the Examiner's § 103(a) rejection of claims 32-35 over Monett.

The Examiner's decision is affirmed-in-part and remanded.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART & REMANDED

tc

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